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4 UNITED STATES DISTRICT COURT
5 WESTERN DISTRICT OF WASHINGTON
6 AT SEATTLE

7 RICHARD McKINNEY,
8

9 Plaintiff,

10 v.

11 STATE OF WASHINGTON
12 DEPARTMENT OF SOCIAL AND
13 HEALTH SERVICES, et al.,

14 Defendants.

CASE NO. C05-691JLR

ORDER

15
16 **I. INTRODUCTION**

17 This matter comes before the court on two motions for partial summary judgment
18 by Plaintiff Richard McKinney (Dkt. ## 19, 24); a motion to continue (Dkt. # 22) and a
19 cross-motion for summary judgment (Dkt. # 42) by Defendants. Having considered the
20 papers filed in support and in opposition, the court DENIES Plaintiff's first motion (Dkt.
21 # 19), DENIES Defendants' motion to continue (Dkt. # 22), DENIES in part and
22 GRANTS in part Plaintiff's second motion (Dkt. # 24), and CONTINUES Defendants'
23 cross-motion (Dkt. # 42) for the reasons stated below.

24 **II. BACKGROUND**

25 Plaintiff lost custody of his children pursuant to an agreed parenting plan order,
26 filed in King County Superior Court in December of 2002. Freimund Decl., Exh. 1.

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28 ORDER – 1

1 Subsequently, Plaintiff filed two separate suits in state court – one against his ex-wife,
2 Mary Cunniffe, for alienation of his child's affections, and one against the Defendants,
3 Washington State Department of Social and Health Services ("DSHS") and two of its
4 employees, social workers Ken Kramer and Michael Saunderson. In his complaint
5 against DSHS and its social workers, Plaintiff alleges, among other claims, equal
6 protection and due process violations, tortious interference with his parental rights, and
7 negligence in investigating claims of misconduct toward his children. Defendants
8 removed to this court.

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10 Although discovery does not close in this matter until July 24, 2006, Plaintiff now
11 moves for partial summary judgment to attack two affirmative defenses. Defendants filed
12 a cross-motion for summary judgment on grounds of judicial estoppel and qualified
13 immunity as part of its response to Plaintiff's second motion.
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15 III. ANALYSIS

16 A. Legal Standard

17 On a motion for summary judgment, the court is constrained to draw all inferences
18 from the admissible evidence in the light most favorable to the non-moving party.
19 Addisu v. Fred Meyer, Inc., 198 F.3d 1130, 1134 (9th Cir. 2000). Summary judgment is
20 appropriate where there is no genuine issue of material fact and the moving party is
21 entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party bears
22 the initial burden to demonstrate the absence of a genuine issue of material fact. Celotex
23 Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party has met its burden,
24 the opposing party must show that there is a genuine issue of fact for trial. Matsushita
25 Elect. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986). The opposing
26 party must present significant and probative evidence to support its claim or defense.
27 Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d 1551, 1558 (9th Cir. 1991).

1 Where the non-moving party demonstrates that it needs additional discovery to
 2 oppose a summary judgment motion, the court has wide discretion to deny summary
 3 judgment or grant additional time for the non-moving party to conduct discovery. Fed.
 4 R. Civ. P. 56(f); Burlington Northern & Santa Fe R.R. Co. v. The Assiniboine, 323 F.3d
 5 767, 773-74 (9th Cir. 2003). That is, a party must have an adequate opportunity to
 6 develop its claims or defenses before summary judgment is appropriate.
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8 **B. Plaintiff's First Motion¹ for Partial Summary Judgment on Defendants' Eleventh Affirmative Defense**

9 Defendants plead the following affirmative defense: "the damages and/or injuries
 10 sustained, if any, were proximately caused by the negligent actions and/or omissions of
 11 third persons over whom this defendant had no control." Defs.' Answer (Dkt. # 4, Part 3
 12 at 19). In response to an interrogatory on the same subject, Defendants identify
 13 Plaintiff's wife and children as persons with a nexus to Plaintiff's claimed injuries. Pl.'s
 14 1st Mot; Exh. 2. Plaintiff now attempts to foreclose Defendants' eleventh affirmative
 15 defense by arguing that Defendants are not permitted by Washington law to apportion
 16 fault to Plaintiff's ex-wife and children. In support of his motion, Plaintiff cites to an
 17 unpublished opinion of the Washington Court of Appeals which held that Plaintiff's suit
 18 against his ex-wife failed as a matter of law based on public policy considerations. Pl.'s
 19 1st Mot., Exh. 1. Plaintiff also cites to state law authority interpreting Washington's
 20 comparative fault statute, RCW § 4.22.070. Defendants request that the court continue
 21 the motion under Fed. R. Civ. P. 56(f) ("Rule 56(f)") in order to allow time for the
 22 Washington Supreme Court to accept or deny Plaintiff's petition to review the dismissal
 23 of his suit against his ex-wife.
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 27 ¹ For ease of reference, the court considers Plaintiff's motions in calendar sequence. Thus,
 28 the "first" motion is in reference to docket no. 19 and the "second" motion is in reference to
 docket no. 24.

1 Plaintiff's first motion for partial summary judgment is premature. At bottom,
 2 Plaintiff's motion is an attempt to gain the court's preemptive ruling to bar Defendants
 3 from negating the causation element of one of his claims.² The court notes, as a general
 4 matter, that a defendant is entitled to shepherd evidence and attempt to prove that the
 5 "empty chairs" in a lawsuit are the proximate cause of the injuries alleged. See, e.g.,
 6 Geurin v. Winston Industries, Inc., 316 F.3d 879, 884 (9th Cir. 2002) (reversing district
 7 court's partial summary judgment on manufacturer's affirmative defense of third-party
 8 liability where discovery still open). Indeed, the state court rules in effect when
 9 Defendants filed their Answer, require parties to plead such an affirmative defense or risk
 10 waiver. Wash. Super. Ct. Civ. R. 8(c), 12(i).³ Neither party cites any binding on-point
 11 authority that would dictate a different result where the empty chair is a spouse or a child.
 12 The court is unwilling, at this juncture, to assume the application of an unpublished, non-
 13 binding state court dismissal that nowhere discusses causation in the context of an empty
 14 chair defense. Accordingly, the court DENIES Plaintiff's motion without prejudice.
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17 For similar reasons, the court declines to exercise its discretion to certify to the
 18 Washington Supreme Court Plaintiff's selection of issues that he claims are determinative
 19 in the instant matter, namely, the apportionment of fault to a nonparty (his ex-wife and
 20 children) and the applicability of Tegman v. Accident & Medical Investigations, Inc., 75
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23 ² Notably, Plaintiff's federal claim under 42 U.S.C. § 1983 requires him to prove
 24 causation, although Plaintiff confines his argument to the propriety of apportioning fault to a non-
 25 party, his ex-wife, solely in relation to his state law negligence claim.

26 ³ Subsection 12(i), entitled "Nonparty at Fault" reads, in relevant part, "Whenever a
 27 defendant . . . intends to claim for purposes of RCW 4.22.070(a) that a nonparty is at fault, such
 28 claim is an affirmative defense which shall be affirmatively pleaded by the party making the claim." Wash. Super. Ct. Civ. R. 12(I).

1 P.3d 497 (Wash. 2003). It is premature to say that either question is determinative;
2 indeed, Defendants have not yet argued that Tegman even applies to this action.

3 The court also denies Defendants' Rule 56(f) motion to continue on the grounds
4 presented. Defendants' request requires this court to assume that the issues raised in
5 Plaintiff's suit against his ex-wife resolve questions of causation in the instant matter.
6 The court need not reach the question at this time.
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8 **C. Plaintiff's Second Motion for Partial Summary Judgment on Defendants'
9 Third Affirmative Defense**

10 Defendants' third affirmative defense states: "plaintiff's action against this
11 defendant is barred by the doctrine of res judicata and/or collateral estoppel." On
12 Plaintiff's second motion for partial summary judgment, Plaintiff again seeks adjudication
13 over the propriety of one of Defendants' affirmative defenses. In doing so, Plaintiff asks
14 this court to join him in the mental exercise of predicting how Defendants will attempt
15 (and supposedly fail) to apply their third affirmative defense to as-yet unspecified claims.
16 Pl.'s 2nd mot. at 2. In response, Defendants contend that the action should be dismissed
17 on the related ground of judicial estoppel or on qualified immunity. Defendants do not
18 address the preclusion doctrines briefed by Plaintiff. In reply, Plaintiff chastises
19 Defendants for their change in litigation strategy.
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21 Defendants do not appear to dispute the inapplicability of res judicata and
22 collateral estoppel to this case. Accordingly, the court GRANTS Plaintiff's motion for
23 partial summary judgment on the collateral estoppel and res judicata issue.

24 As to Defendants' cross-motion for summary judgment on grounds of judicial
25 estoppel and qualified immunity, the court CONTINUES Defendants' motion to allow
26 additional time for Plaintiff to respond to the qualified immunity question. In filing their
27 cross-motion, Defendants failed to provide adequate notice to allow Plaintiff time to
28 respond – which Plaintiff dramatizes as a "breathtaking display of hubris." Pl.'s 2nd

1 Reply at 1. Plaintiff is indeed entitled to notice of the additional grounds raised in
2 Defendants' cross-motion. See Cunningham v. Rothery, 143 F.3d 546, 549 (9th Cir
3 1998). To that end, the court renotes Defendants' motion for Friday, March 17, 2006,
4 with Plaintiff's opposition due no later than Monday, March 13th, and Defendants' reply
5 (if any) due no later than the noting date.⁴ Local Rules W.D. Wash. CR 7(d). The court
6 directs the parties to limit any additional briefing solely to the question of qualified
7 immunity.

9 **IV. CONCLUSION**

10 For the foregoing reasons, the court DENIES Plaintiff's first motion (Dkt. # 19),
11 DENIES Defendants' motion to continue (Dkt. # 22), DENIES in part and GRANTS in
12 part Plaintiff's second motion (Dkt. # 24), and CONTINUES Defendants' cross-motion
13 (Dkt. # 42). The court renotes Defendants' cross-motion for consideration by the court
14 on Friday, March 17, 2006.

16 Dated this 9th day of February, 2006.

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19 JAMES L. ROBART
United States District Judge

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27 ⁴ The court grants ample time for Plaintiff to file opposition papers based on his indication
that he is undergoing surgery sometime between now and March 15th (and will be leaving the
28 state on two occasions).